

FOI-2024-80046

20 February 2025

Robert

By Email: foi+request-12420-c8b1cdba@righttoknow.org.au

Dear Robert

Freedom of Information Act 1982 – Notice of Internal Review Decision

1. I refer to your email of 2 February 2025 requesting an internal review of a decision sent to you on 28 January 2025 under section 54 of the *Freedom of Information Act 1982* (FOI Act). The scope of your original request was:

"On 12 March 2024, in matter NSD 1076/2023 – Eli Turner v Commonwealth Ombudsman, Justice Perry of the Federal Court of Australia issued, by order:

a) a writ of certiorari quashing the decision of a delegate of the Commonwealth Ombudsman dated 31 August 2023; and

b) a writ of mandamus directing the Commonwealth Ombudsman to determine Mr Turner's application according to law.

(<https://comcourts.gov.au/file/Federal/P/NSD1076/2023/3965406/event/31721986/document/2245763>)

Prior to the issuance of the writs, the Commonwealth Ombudsman conceded that the decision dated 31 August 2023 is affected by jurisdictional error because the delegate erred in the exercise of their discretion by concluding that the "Office is limited to considering the reported conduct, rather than the impact of the abuse" and that this error was material.

Under the FOI Act 1982 (Cth), I request access to the decision notice (including the reasons in support of the decision), dated 31 August 2023, which was affected by jurisdictional error."

Background:

2. In your correspondence requesting an internal review you made submissions regarding our Office's application of sections 47F and 47E of the FOI Act to exempt

the document requested in full. It is your view the document titled 'Final decision letter regarding reparation payment' (Document 1) should be released to you in full and you provided detailed reasons as to why it should be released in full. I have considered your submissions and address sections 47F and 47E below.

Internal review decision

3. I am an authorised internal review decision maker under section 23(1) of the FOI Act. I am required to make a fresh decision on behalf of our Office and I am not bound by the original decision.
4. I affirm the original decision.

Material taken into account

5. In conducting the internal review, I had regard to the following:
 - the scope of your original FOI request
 - Ms Mackenzie's decision dated 28 January 2025
 - the searches undertaken by Ms Mackenzie and relevant business unit
 - the document
 - the consultations undertaken by Ms Mackenzie with Ombudsman staff members
 - the consultation undertaken by Ms Mackenzie with a third party under section 27A of the FOI Act
 - the relevant provisions of the FOI Act
 - your email dated 2 February 2025 and the links you provided
 - Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, available at www.oaic.gov.au (**FOI Guidelines**).

Reasons for decision

6. In relation to the substantive decision, I agree that release would involve the unreasonable disclosure of personal information and would also have a substantial adverse effect on the proper and effective conduct of operations of this office.

Conditional exemption – personal privacy: section 47F

7. In your email dated 2 February 2025, you provided your view section 47F should not apply to your request. You stated that you know that 'the person affected by the delegate's decision is Mr Eli Turner' and provided the link to the Federal Court judgement dated 12 March 2024 (No: NSD1076/2023). You also provided a link to an ABC article referencing Mr Turner's experience in the 'Australian Army'.
8. You have stated that given the above information 'the argument that the decision notice should be given access to wholesale because aspects of the decision notice, not to recommend reparation payments to Mr Eli Turner, contain Mr Turner's name, or details about his service in the Australian Army, is unjustifiable [sic].'
9. I have considered the information you have provided and your views on the use of section 47F of the FOI Act.
10. As noted by Ms Mackenzie, the document subject of the internal review contains personal information of third parties in the form of their full names, place of employment, a signature of an Ombudsman staff member, a summary of the abuse reported to our Office, and details of past service history in the Australian Defence Force.
11. Ms Mackenzie considered the factors required by section 47F(2). I agree with Ms Mackenzie's assessment that the relevant information contained within the document is not well known. While you have provided the link to the Federal Court findings in the matter *Eli Turner v Commonwealth Ombudsman NSD1076/2023* and the ABC article to support your view, details about the contents of the letter were not disclosed in either of these links. I also note the sensitive nature of the details of the abuse reported and note that this information is not readily available from public sources and agree with Ms Mackenzie's determination that the

disclosure of this information is unreasonable. There is a significant risk that disclosure could cause real harm to individuals.

12. I am satisfied that the document is exempt under section 47F of the FOI Act.

Conditional exemption – certain agency operations: section 47E

13. In your email dated 2 February 2025, you suggest disclosing the document would not have a substantial adverse effect on the proper and efficient conduct of operations of our office in accordance with section 47E(d) of the FOI Act. In summary, it is your view the Federal Court findings of a jurisdictional error in *Eli Turner v Commonwealth Ombudsman NSD1076/2023* 'discloses unlawful activity'. You state that the 'decision notice discloses the inefficiencies of the Ombudsman's delegate' meaning section 47E(d) 'has no application to the decision notice not to recommend a reparation payment to Mr Eli Turner.'

14. In relation to the public interest in section 47E(d) you also referenced the Royal Commission into Defence and Veteran Suicide and that Mr Eli Turner's details were known. You state it is in the public interest 'that the failures of the Ombudsman's delegate are published so that the public is better able to scrutinise how our veterans are being let down...'

15. Ms Mackenzie considered the document subject of this review and noted the FOI Guidelines in relation to section 47E(d). The FOI Guidelines provide the section 47E(d) may apply to documents that relate to a complaint made to an investigative body, and I consider the section applies here.

16. Ms Mackenzie also considered that where our Office receives reports of alleged abuse under the *Defence Abuse Reparation Scheme under Part IIA of the Ombudsman Act 1976 (Cth) (the Scheme)*, members of the public complete a form which assures applicants their personal information is treated as confidential.

17. In considering whether the public interest would favour disclosure, whilst disclosure may increase transparency in the Ombudsman's assessments of alleged abuse and recommendations under the Scheme, that factor is outweighed by the key risk posed to future Ombudsman investigations and the successful operation of the Scheme. Those who have made or may make reports

to the Scheme and those who interact with this Office in general must be assured that their interactions will be treated in confidence. Release of information, in particular sensitive personal information which may include specific details of abuse could reasonably be expected to discourage the public from engaging with this Office. Therefore, it is likely that the Office of the Ombudsman would be compromised in its ability to obtain information from defence abuse reportees as well as the public more generally if there was a risk that personal information was published online.

18. I am therefore satisfied that the document is also exempt under section 47E(d) of the FOI Act.

Documents containing material obtained in confidence – section 45

19. Whilst I have noted Ms Mackenzie's observations that the information contained in the document may be considered material obtained in confidence under section 45 of the FOI Act, in my view the entire document is exempt under sections 47E and 47F. Therefore, it is not necessary for me to consider section 45 any further.

Access to edited copies with exempt or irrelevant matter deleted – section 22

20. I have considered whether access to an edited copy of the document with exempt or irrelevant matter deleted could be provided under section 22 of the FOI Act. I have determined that it is not practicable to provide an edited copy of the document under section 22 of the FOI Act.

Review rights

Information Commissioner review or complaint

21. You have the right to seek IC review of this decision. An application for IC review must be made in writing within 60 days of the decision.

22. If you are not satisfied with the way we have handled your FOI request, you can lodge a complaint with the OAIC. However, the OAIC suggests that complaints are made to the agency in the first instance.

23. While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied

with the way your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.

24. You can make an IC review application or make an FOI complaint in one of the following ways:

- online at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>
- via email to foidr@oaic.gov.au
- by mail to GPO Box 5218 Sydney NSW 2001, or
- by fax to 02 9284 9666.

25. More information about the Information Commissioner reviews and complaints is available at its website: www.oaic.gov.au/freedom-of-information/foi-review-process.

Contact

26. You may contact me at information.access@ombudsman.gov.au

Yours sincerely,



Alison Kay

Legal Officer

Legal Team

ATTACHMENT A

SCHEDULE OF DOCUMENTS

Doc No	Description of document	Primary Decision	Internal Review Decision
1.	<p>Final decision letter regarding reparation payment</p> <p>Decision notice of decision not to recommend a reparation payment dated 31 August 2023</p>	<p><i>Exempt in full</i></p> <p>Section 47F – public interest conditional exemption – personal privacy</p> <p>Section 47E – public interest conditional exemption – certain operations of agencies</p>	<p><i>Affirm</i></p>